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February 12, 2002

VIA ELECTRONIC DELIVERY

Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC, 20554

Re: SBC Section 272 Compliance Biennial Audit Report in CC Docket No. 96-150

Dear Ms. Attwood:

On behalf of AT&T Corp., I am requesting that the unredacted version of the Report of Independent Accountants on Applying Agreed-Upon Procedures, prepared by Ernst & Young LLP (the "Auditor") and filed on December 17, 2001 ("SBC § 272(d) Audit Report") be placed in the public file.¹ It is clear from the Commission's *Section 272 Audit Disclosure Order* in the Verizon Section 272 audit proceeding² that the unredacted version of the SBC § 272(d) Audit Report must be made available for "public inspection." Masking from the public the very information needed to evaluate SBC's

¹ The Auditor should also be required to file the unredacted version of the Agreed-Upon Procedures Audit filed by SBC on September 4, 2001 in CC Docket No. 98-141, which is the equivalent of Exhibits C and F to Verizon's June 18, 2001 § 272(d) Audit Report.

² *In the Matter of Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, Memorandum Opinion and Order, CC Docket No. 96-150 (rel. Jan. 10, 2002), ("*Section 272 Audit Disclosure Order*").

compliance with Section 272 undermines both the letter and spirit of the audit requirements imposed by Section 272(d).

In its § 272(d) Audit Report, SBC engaged in the same kind of wholesale redaction as Verizon did,³ redacting virtually the same types and categories of data. In both proceedings, the redacted information was not raw data, such as complete records of individual transactions, but rather aggregated information that summarizes and reformats detailed findings. In both proceedings, the data is over a year old. And in both proceedings, the BOC redacted: (a) data regarding its performance towards its own operations – information needed by the public to comment on the BOCs compliance with Section 272(e)(1)’s nondiscrimination safeguards;⁴ (b) data regarding whether the BOC’s affiliates paid the same amount for exchange access services as unaffiliated entities;⁵ (c) data regarding whether the BOC’s affiliate received goods and services at preferential rates, terms, or conditions;⁶ (d) information relating to the BOC’s compliance with the

³ In the SBC § 272(d) Audit Report, 37 pages out of 93 (excluding cover sheets and tables of contents) had redacted information -- often redactions of entire tables of information. In the Verizon proceeding, Verizon requested confidential treatment for information on 28 out of 87 pages in its June 11, 2001 audit report and on 12 out of 45 pages in its June 18, 2001 supplement to the final audit report. *Section 272 Audit Disclosure Order*, ¶ 4.

⁴ Compare Verizon § 272(d) Audit Report at App. A, 36 (requesting redactions of Verizon’s provisioning and repair performance for its own operations) with SBC’s § 272(d) Audit Report, Attachment A-7 (same).

⁵ Compare Verizon § 272(d) Audit Report at App. A, 48 (requesting redactions for the “Amount Recorded and Paid by Section 272 Affiliate” for exchange access services and local exchange services) with SBC’s § 272(d) Audit Report, Table 10 on exchange access and local access services (including amounts in dispute with SBCS).

⁶ Compare Verizon § 272(d) Audit Report at App. A, 24-25 (requesting redactions for amounts billed by the BOC to the affiliate and the amount not paid by the affiliate) with SBC’s § 272(d) Audit Report, Attachments A-5a and A-5b (sampling by the Auditor showing discrimination in billing and collection services) and Attachment A-5(c) (sampling by the Auditor showing discrimination in rates charged for local exchange services).

affiliate transaction rules,⁷ and (e) portions of the BOC's responses to the independent auditor's findings.

Those redactions "hamper [... the] parties' ability to evaluate the scope and seriousness of the facts in the audit report."⁸ Indeed, as the Commission found in the Verizon proceeding, the public needs access to the redacted information to be able to comment meaningfully on SBC's § 272(d) Audit Report.⁹

Finally, the redacted information must be disclosed because it does not appear (at least from the public record) that SBC has made the requisite request that the Commission treat the redacted information as confidential. Moreover, even if SBC had made such a request, it would have been to no avail. From the context of SBC's redactions, the redacted information does not appear to be confidential. To the contrary, the redacted data is either aggregated data or is otherwise non-proprietary. For example, SBC marked the addresses for department locations and "the primary address of the Section 272 affiliate" as proprietary.¹⁰ It is unclear why, *e.g.*, the state in which its "Affiliate Services" department is located is proprietary.

⁷ Compare Verizon § 272(d) Audit Report at App. A, 23-24 (requesting redactions for transactions in which the BOC charged an amount other than fully distributed cost) with SBC's § 272(d) Audit Report, Table 6 (Sample Summary of Services Provided by SBCS to SBC BOCs) as well as other redacted data in Procedures 9, 10 and 13.

⁸ *Section 272 Audit Disclosure Order*, ¶ 8.

⁹ See also, the redactions in Objective IX, Table 8, and Procedure 4 and the redactions in Objective X, Table 9 (the trend analysis of revenue, by month, of incidental interLATA services provided by the SBC BOCs). SBC also redacted data necessary to evaluate its compliance with the structural separation requirements (Objectives I through IV), including data relating to: (a) employees (Attachment A-1); (b) operation, installation and maintenance (OI&M) services (Attachment A-2); (c) Transmission and Switching Facilities (Table 1); and inter-entity credit arrangements (Table 3).

¹⁰ See, *e.g.*, Attachments A-1 and A-2.

This case falls squarely within the Commission’s decision in *Section 272 Audit Disclosure Order*, requiring the Auditor to make the entire Section 272 audit report public. The Commission so held because: (a) the plain language of Section 272(d)(2) “mandates public disclosure of the results of the audit, which are contained in the final audit report;”¹¹ (b) the use of the agreed-upon procedures (“AUP”) type of audit for these proceedings “necessarily requires” disclosure of the redacted facts to the public so that they could intelligently comment on the audit results;¹² and (c) the Commission’s rules governing the Section 272(d) biennial audit require that interested parties be able to “obtain this information without difficulty.”¹³ The Commission’s holding, by its terms and its reasoning, was not limited to the Verizon proceeding. As the Commission held, “[a]llowing BOCs to withhold information from the final section 272(d) audit report would prevent parties from exercising their statutory right to comment on the audit results.”¹⁴

In the *Section 272 Audit Disclosure Order*, the Commission found that Section 272(d)(2) superseded any potentially conflicting provision in the Communications Act or any other Act. Thus, the Commission held that disclosure was consistent with Section 220(f) of the Communications Act,¹⁵ both because the Section 272 audit “is

¹¹ *Section 272 Audit Disclosure Order*, ¶ 5. Section 272(d)(2) provides that the independent auditor “shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection” and that “[a]ny party may submit comments on the final audit report.” 47 U.S.C. § 272(d)(2).

¹² *Id.*, ¶ 6.

¹³ *Id.*, ¶ 7 (citing to Accounting Safeguards Under the Telecommunications Act of 1996, *Report and Order*, 11 FCC Rcd 17359 (1996) (*Accounting Safeguards Order*), ¶ 200, *Second Order on Reconsideration*, 15 FCC Rcd 1161 (2000)).

¹⁴ *Id.*, ¶ 8 (emphasis added).

¹⁵ See, 47 U.S.C. §220(f) which prevents disclosure of information gathered during audits pursuant to section 220 except as directed by the Commission or a court; see

conducted under the specific authority of section 272(d), not the general authority of section 220” and “the specific audit and disclosure provisions of section 272(d) override the more general audit authority of section 220,”¹⁶ and because disclosure was in any event consistent with Section 220(f).¹⁷

In the *Section 272 Audit Disclosure Order*, the Commission also found that disclosure of the redacted information is consistent with section 272(d)(3), which subjects only the underlying independent auditor’s workpapers to “confidential treatment in accordance with [the Commission’s] usual processes and procedures.”¹⁸ In so finding, the Commission rejected Verizon’s claim that because the final report “would (as all audit reports do) contain information also found in the auditor’s workpapers” such information must automatically be exempted from disclosure, as a non-sensible construction of the section 272 audit requirements. Finally, the Commission held that its release of the redacted information was consistent with the Trade Secrets Act¹⁹ and Exemption 4 of the Freedom of Information Act (FOIA)²⁰ on

also, Qwest Communications International, Inc. v. FCC, 229 F.3d 1172, 1178-79 (C.A.D.C. 2000).

¹⁶ *Id.*, ¶ 9.

¹⁷ *Id.* at n.28, wherein the Commission noted that section 220 does not prevent disclosure of information gathered in audits; rather, it allows the Commission to disclose audit information pursuant to certain procedures. The Commission expressly stated that its holding in the *Section 272 Audit Disclosure Order* was also consistent with the Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Report and Order*, 13 FCC Rcd 24816 (1998) (*Confidential Treatment Order*), *order on reconsideration*, 14 FCC Rcd 20128 (1999). *See, Section 272 Audit Disclosure Order*, ¶¶ 8, n. 22 (aggregated data generally not protected), 11 at n. 33 (same) and 12 at n. 38.

¹⁸ *Id.*, ¶ 10.

¹⁹ 18 U.S.C. § 1905, the Commission noting that the Trade Secrets Act makes it a misdemeanor for any agency employee to “make[e] known in any manner or to any extent not *authorized by law* any information coming to him in the course of his employment . . . concern[ing] or relat[ing] to trade secrets” and related confidential data. *Section 272 Audit Disclosure Order* at n. 44.

which section 0.459 is based “because section 272(d) expressly mandates public release.”²¹

The *Section 272 Audit Disclosure Order* is also instructive because therein, the Commission concluded that Verizon’s showing in support of its general request for Confidentiality was insufficient. The Commission rejected two of Verizon’s three more specific claims of harm, *i.e.*, that the redacted information “could provide competitors a negotiating advantage” with third parties or that “competitors could develop marketing strategies and plans based on” this disclosed information. The Commission reasoned that the information was not confidential because it was merely aggregated information, it was required to be disclosed under the Commission’s rules,²² and it did not disclose what Verizon claimed it disclosed.²³ As to Verizon’s third argument, that similar information was not available to Verizon from its long distance competitors, the Commission concluded that Section 272(d) clearly imposed a transparency requirement on the transactions between the BOCs and their section 272 affiliates.²⁴ Indeed, the unredacted version of the Verizon § 272(d) Audit Report, which the Commission ordered placed in the public file, confirmed precisely what AT&T had claimed -- that the data was either aggregate data or specific data from only a small portion of sampled

²⁰ 5 U.S.C. § 0.552(b)(4).

²¹ *Section 272 Audit Disclosure Order*, ¶ 14. As to the Trade Secrets Act the Commission cited to *Qwest Communications, supra*, 229 F.3d at 328-31 (“The *Qwest Communications* court found that the [Communications] Act and the Commission’s regulations satisfied the “authorized by law” requirement. ”)

²² 47 C.F.R. § 53.203(e) (the BOC is required to publicly disclose information concerning the goods and services which a section 272 affiliate buys from the BOC).

²³ *Section 272 Audit Disclosure Order*, ¶¶ 16-17. Some of the information was also otherwise publicly available, *id.*, ¶ 17.

²⁴ *Id.*, ¶ 18.

data, of no utility to competitors but of great significance in evaluating Verizon's compliance with Section 272.²⁵

SBC should not be allowed herein to reargue claims that it made in the Verizon proceeding -- claims which were rejected by the Commission after careful consideration. There is no justification for a different result here. Indeed, in the Verizon proceeding, SBC acknowledged that it was "aware that this Order [i.e., the *Section 272 Audit Disclosure Order*] sets a precedent that might be applied to SBC in the future." SBC accordingly filed comments supporting Verizon's Motion for Reconsideration, which was denied by the Commission.²⁶ Thus SBC has had a full opportunity to be heard on these issues, and its arguments have been rejected.

In the Verizon proceeding, SBC argued that Congress in Section 272 did not override Section 220(f) because Section 272(d)(3) protects the auditor's underlying workpapers and "[i]t would be illogical to conclude that the FCC can avoid the application of the statutory protection of workpapers by the simple effort of requiring all the information in the workpapers to be incorporated into the final audit report."²⁷ Any attempt by SBC to renew that argument here should be similarly rejected.

Section 272(d) carefully distinguishes between the final report, as to which the public has a right of public inspection (Section 272(d)(2)), and the underlying "working papers and supporting materials," (Section 272(d)(3)), which are to be made available only to the Commission and the State commission.²⁸ Moreover, this distinction is

²⁵ See, e.g., Tables 14a and 14c of the Verizon § 272(d) Audit Report.

²⁶ Comments of SBC Communications, Inc., filed on January 25, 2002 ("SBC Comments").

²⁷ *Id.* at 4-5.

²⁸ Section 272 (d)(3)(B). Section 272 (d)(3)(C) provides that the State commission has the obligation to implement procedures necessary to protect any "proprietary

obviously correct because, as the Commission explained in the *Section 272 Audit Disclosure Order*, the final report contains only aggregated data and/or data that must otherwise be publicly disclosed, while the underlying work papers and supporting materials may, in fact, contain more specific data that the BOCs are not required to publicly disclose.²⁹

SBC also argued in the Verizon proceeding that the Commission should follow past precedent on Exemption 4 of FOIA.³⁰ The crux of SBC's argument was that "the limited role of third party participation does not require anything more than the redacted version of the audit report to be made."³¹ But in a Section 272 proceeding, unlike other proceedings where the FOIA precedent may be applicable, the public's role is not so limited. To the contrary, Section 272(d)(2) specifically mandates that the entire report must be made available for "public inspection." Indeed, SBC concedes as much in its subsequent discussion of AUP audits, arguing that the specified user requires access to the specific factual information in the audit.³² And contrary to SBC's argument in the Verizon proceeding, the public is a "specified user" by virtue of the express language in Section 272(d)(2).³³

information submitted to it under this section," that is, Section 272 (d)(3) (*i.e.*, submitted to it as part of the working papers and supporting materials).

²⁹ *Section 272 Audit Disclosure Order*, ¶ 11.

³⁰ SBC Comments at 5-7.

³¹ *Id.* at 6.

³² *Id.* at 8.

³³ *Id.* at 9. AT&T cannot address claimed changes in the process and SBC's reliance thereon because AT&T was not privy to any of those discussions, or even to any interim drafts other than *Proposed Model for Preliminary Biennial Audit Requirements*, DA 97-1494, 12 FCC Rcd. 13132 (1997). But the short answer is that regardless of the auditing procedures agreed upon by SBC and JOT, such procedures cannot override the public's statutory right to publicly inspect the final report under Section 272(d)(2).

Finally, in the Verizon proceeding, AT&T addressed why the “public inspection” requirement of Section 272(d)(2) would not be satisfied by the issuance of a Protective Order.³⁴ Specifically, AT&T noted that such an Order might impose prohibitive costs on smaller CLECs and members of the public who might be required to travel to a specified location if the BOC denominated the information “Copy Prohibited,” thus effectively precluding the statutory requirement of a “public inspection” and contravening the Commission’s requirement that interested parties be able to “obtain this information without difficulty.”³⁵ AT&T also noted that a Protective Order would be inappropriate because such an Order was likely to preclude the use of the proprietary information in other federal and state regulatory and judicial proceedings. Indeed, the Verizon Proposed Protective Order³⁶ contained just such restrictions.³⁷

For the foregoing reasons, AT&T respectfully requests that Auditor be compelled to file an unredacted version of the SBC § 272(d) Audit Report.

³⁴ Letter from Aryeh Friedman, Senior Attorney, AT&T, to Ms. Carol Matthey, Deputy Chief, Common Carrier Bureau, Federal Communications Commission, January 18, 2002, filed in CC Docket No. 96-150. AT&T incorporates that letter herein by reference.

³⁵ *Id.*, ¶ 7 (citing to Accounting Safeguards Under the Telecommunications Act of 1996, *Report and Order*, 11 FCC Rcd 17359 (1996) (*Accounting Safeguards Order*), ¶ 200, *Second Order on Reconsideration*, 15 FCC Rcd 1161 (2000)).

³⁶ Appended to the *ex parte* Letter from Gerald Asch, Director, Federal Regulatory, Verizon, to Ms. Carol Matthey, Deputy Chief Common Carrier Bureau, Federal Communications Commission, filed in CC Docket No. 96-150, with cover letter to Ms. Magalie Roman Salas, Secretary, dated January 18, 2002.

Thank you for your attention to this matter. You may direct any questions to the undersigned.

Respectfully submitted,

Aryeh S. Friedman

cc: Carol Matthey
Hugh Boyle
Anthony Dale
Mark Stone